Supreme Court, U. S.
FILED
OCT 12 1977
MICHAEL RODAK, JR., CLERK

No. 77-104

IN THE

Supreme Court of the United States

October Term, 1977

CONSOLIDATED RAIL CORPORATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, THE GROCERY MANUFACTURERS OF AMERICA, INC.

JOHN F. DONELAN
FREDERIC L. WOOD
914 Washington Building
Washington, DC 20005

Attorneys for Respondent

Donelan, Cleary, Wood & Maser
914 Washington Building
Washington, DC 20005

Of Counsel

October 12, 1977

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

TABLE OF AUTHORITIES

Cases **Page**

Ann Arbor R. Co. v. United States. 368 F. Supp. 101 (E.D. Pa. 1973), *aff'd.* 419 U.S. 807 (1974) 4

Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade. 412 U.S. 800 (1973). 7

Bowman Transport v. Arkansas-Best Freight. 419 U.S. 281 (1974) 6

Carter-Wallace, Inc. v. Gardner. 416 F.2d 1086 (4th Cir. 1969), *cert. den.*, 398 U.S. 938 (1970) 7

Ethyl Corp. v. Environmental Protection Agency. 541 F.2d 1 (D.C. Cir. 1976), *cert. den.*, 426 U.S. 941 (1976). 6

Illinois Terminal R. Co. v. United States. 541 F.2d 201 (8th Cir. 1976), *cert. den.*, ____ U.S. ____, 5 L. Ed.2d 582 (1977). 4

United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972) 6

United States v. Florida E.C. Ry. Co., 410 U.S. 224 (1973), *on remand*, Florida E.C. Ry. Co. v. United States, 368 F. Supp. 1009 (M.D. Fla. 1973), *aff'd.* 417 U.S. 901 4

Statutes:

Administrative Procedure Act
5 U.S.C. § 553 6
5 U.S.C. § 553(c) 6
5 U.S.C. § 706(2)(E) 6

Interstate Commerce Act
49 U.S.C. § 1 (14)(a) 2, 4, 5

Page

Code of Federal Regulations:
49 C.F.R. Part 1036 3
49 C.F.R. §1036.4 3
49 C.F.R. §1036.5 3

Public Laws:
P.L. 89-430, 80 Stat. 168 (1966) 2
P.L. 94-210, 90 Stat. 46 (1976) 2, 5

Legislative History:
H. Rep. No. 1183, 89th Cong., 1st Sess. 3 (1965) 2
H. Rep. No. 94-725, 94th Cong., 1st Sess. 110 (1975). 5

Federal Register:
42 Fed. Reg. 23511 3
42 Fed. Reg. 40444 3
42 Fed. Reg. 48883 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-104

CONSOLIDATED RAIL CORPORATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, THE GROCERY MANUFACTURERS OF AMERICA, INC.

QUESTIONS PRESENTED

1. Whether the action of the Interstate Commerce Commission requiring the application of incentive per diem charges to food-quality boxcars exceeded its statutory authority.

2. Whether the court below acted within the proper scope of judicial review in approving the Commission's action.

ARGUMENT

The Questions Presented Are Not Substantial

I. THE INTERSTATE COMMERCE COMMISSION HAS NOT EXCEEDED ITS AUTHORITY

The decision of the Court of Appeals finding that the action of the Interstate Commerce Commission (Commission or ICC) in requiring the application of incentive per diem charges to food-quality boxcars was within the scope of its statutory authority does not raise any substantial questions requiring review by this Court. The court below correctly found that the "broad delegation" of authority to the Commission in Section 1(14)(a) of the Interstate Commerce Act[1] was sufficient authority for its action. (Pet. App. p. A36) There can be no doubt that the statute authorizes the Commission to include an incentive element in the prescribed compensation for any type of freight car which will, *inter alia*, "encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce. . ."[2] This phraseology was added to Section 1(14)(a) in 1966.[3] It indicates clearly that the Congress intended the Commission to use the authority granted to prescribe incentive per diem rates not only to penalize railroads for inefficient car utilization practices and to provide an adequate economic return on their investment in freight cars, but also to "induce railroads and others to acquire and to own railroad freight cars."[4]

---

[1] 49 U.S.C. §1(14)(a).

[2] *Id.* This phrase appears in the statute as it read at the time of the I.C.C.'s action and was unchanged after its amendment by Section 2(a) of the Railroad Revitalization and Regulatory Reform Act (Pub. 94-210, 90 Stat. 46, Feb. 5, 1976). See Pet. App. pp. A1-A3.

[3] Pub. L. 89-430, 80 Stat. 168, May 26, 1966.

[4] H. Rep. No. 1183, 89th Cong. 1st Sess. 3 (1965).

It is apparent from even a quick review of the I.C.C.'s incentive per diem regulations that their whole purpose is to encourage the acquisition of some important types of freight cars (such as food-quality boxcars) by the railroads in order to improve the available supply for the shipping public.[5] The regulations provide that any net incentive per diem credit balance held by any car-owning railroad as a result of the payment of the charges applicable to the types of cars involved must be used to build, purchase or lease additional freight cars of the same types.[6] The ultimate objective of this requirement is the addition of more freight cars to the national railroad pool, an objective certainly within the scope of the statute and consistent with its purpose.[7]

The petitioning railroads contend that the application of incentive per diem to food-quality boxcars was not consistent with any of the statutory purposes. (Pet. p. 9) This assertion could not be further from the truth. The Commission's report under review demonstrates a pervasive awareness of the agency's mission to encourage the acquisition of a type of car necessary to meet the needs of commerce. (Pet. App. pp. A12-A19) The railroads contend that the only purposes of incentive per diem are to compel the return of freight cars to their owners and to provide increased economic returns to car owners in times of car shortages. (Pet. p. 10) But while it includes these purposes, the statute also reflects the desire of Congress that the I.C.C.

---

[5] The complete text of the regulations is found at 49 C.F.R. Part 1036, as revised, 42 Fed. Reg. 23511 (May 9, 1977). Subsequent amendments in particular sections can be found at 42 Fed. Reg. 40444 (August 10, 1977) and 42 Fed. Reg. 48883 (Sept. 26, 1977).

[6] See 49 C.F.R. §§ 1036.4 and 1036.5, as amended.

[7] The "earmarking" of incentive per diem funds for expenditure on acquiring more freight cars was approved in *Illinois Terminal R. Co. v. United States*, 541 F.2d 201, 204-206 (8th Cir. 1976), *cert. den.*, ___ U.S. ___, 51 L. Ed. 2d 582 (Feb. 28, 1977).

take affirmative steps to encourage acquisition of freight cars by the railroads. Various federal courts, including this Court, have recognized the purpose of the incentive per diem statute and the administrative program to be the encouragement of the acquisition of freight cars.[8]

The ultimate objective of the incentive per diem program is to maintain an adequate supply of freight cars, so that the demands of railroad shippers for equipment to transport their commodities can be satisfied.[9] It is in this context that the efforts of shippers of food products to bring to the attention of the I.C.C. their need for an adequate supply of food-quality boxcars must be considered. These shippers have obtained no special benefits because of the agency's action. None of the incentive per diem charges collected by the railroads are paid to them. The Commission prohibited the assignment by the railroads of good-quality boxcars to any particular shipper. (Pet. App. pp. A16-A18, A24-25)[10] The fact that the ultimate beneficiaries of an improved supply of food-quality boxcars petitioned the I.C.C. for relief does not detract one bit from the agency's efforts to ensure the adequate car supply so fervently desired by the Congress.

Finally, if there was ever any doubt about the existence of this desire for improvements in railroad car supply, it has been removed by the addition in 1976 to Section 1(14)(a) of this provision:

[8]See *United States v. Florida E. C. Ry. Co.*, 410 U.S. 224, 233 (1973), *on remand, Florida E. C. Ry. Co. v. United States*, 368 F. Supp. 1009, 1017 (M.D. Fla. 1973), *aff'd*, 417 U.S. 901 (1974). See also *Ann Arbor R. Co. v. United States*, 368 F. Supp. 101, 112 (E.D. Pa. 1973) *aff'd*, 419 U.S. 807 (1974), and *Illinois Term. R. Co. v. United States*, *supra*, 541 F.2d at 202-206.

[9]See note 4, *supra*.

[10]The I.C.C. did permit their assignment to pools of cars restricted to the transportation of food, food products and other noncontaminating products. (Pet. App. pp. A16, A24-25)

> "It is the intent of the Congress to encourage the *purchase, acquisition*, and efficient utilization of the freight cars." [emphasis added][11]

The purpose of the amendment was to achieve:

> "the goal of generating incentive for carriers to acquire and maintain a car fleet adequate for their needs."[12]

The Commission's action was entirely within the scope of its statutory authority. There is no substantial question requiring review by this Court.

II. THE COURT OF APPEALS ACTED WITHIN THE PROPER SCOPE OF JUDICIAL REVIEW OF AGENCY ACTION.

There is no substantial question requiring review by this Court arising from the petitioners' contention that the Court of Appeals exceeded the proper scope of judicial review of the action of the Interstate Commerce Commission. The statute prohibits the Commission from applying incentive per diem "to any type of freight car the supply of which the Commission finds to be adequate . . ."[13] The petitioners incorrectly contend that the I.C.C. did not make a rationally supported finding that the supply of food-quality boxcars was inadequate and that the I.C.C. departed without explanation from its announced standards for applying incentive per diem to a type of freight car.

Informal rulemaking procedures were properly conducted by the Commission before adopting the regulations

[11]Section 212(a), Pub. L. 94-210, 90 Stat. 46, Feb. 5, 1976.

[12]H. Rep. No. 94-725, 94th Cong., 1st Sess. 110.

[13]49 U.S.C. §1(14)(a), as it read at the time of the I.C.C.'s action. (Pet. App. p. A2) This phrase was slightly reworded by the 1976 amendment, note 11, *supra*. (Pet. App. p. A3)

under review.[14] Therefore, the factual findings of the agency may only be reversed by a reviewing court if they are shown to be arbitrary and capricious.[15] This scope of review of the evidence has been characterized by this Court as "a narrow one," and as one in which the agency must only articulate a rational connection between the facts found and the choice made.[16] Moreover,

> "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[17]

There are no grounds for accepting the petitioners' claims that the I.C.C. lacked a rational basis for the required finding of an inadequate supply of food-quality boxcars. (Pet. p. 11) The record before the agency and the court below contained sufficient facts to support the conclusion that such cars were in short supply. (Pet. App. pp. A13-A15, A34-A35 and A49-A50)[18] The Commission relied on both the statistical data available to it and an inference that food-quality boxcars were in short supply arising from the fact that shippers of food products were being compelled to use general-purpose boxcars (subject to contamination) to meet their needs. (Pet. App. pp. A13-A15)

---

[14]See 5 U.S.C. §553 and *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 748-49, 756-58 (1972).

[15]See 5 U.S.C. §§553(c) and 706(2)(E), and also *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 34 (D.C. Cir., 1976), *cert. den.* 426 U.S. 941 (1976).

[16]*Bowman Transport v. Arkansas-Best Freight*, 419 U.S. 281, 285 (1974).

[17]*Bowman Transp. v. Arkansas-Best Freight, supra.* 419 U.S. at 285-86. See also the comprehensive analysis and explication of this standard of review in *Ethyl Corp. v. E.P.A., supra.*, 541 F.2d at 33-37.

[18]Even the dissenting judge accepted the validity of the evidence supporting this finding. (Pet. App. A49-A50)

The court below extrapolated from these facts and concluded that the agency's findings had a rational basis.[19]

Finally the railroads erroneously claim that the Commission failed to explain its departure from its usual criteria for applying incentive per diem. (Pet. pp. 12-14) But, as this Court has said:

> "[I]t is enough to satisfy the requirements of judicial oversight of administrative action if the agency asserts distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing. So long as the policies can be discerned, the court may exercise its proper function of determining whether the agency's policies are consistent with congressional directives."[20]

The court below reviewed the entire decision of the agency and found a "self-evident basis for differentiation."[21] (Pet. App. p. A35)

The Court's review of the I.C.C.'s action was entirely consistent with the proper scope of review of agency action, because it had a rational basis in the record and any departure from prior norms was adequately revealed. There is no substantial question requiring review by this Court.

---

[19]The use of circumstantial evidence in administrative proceedings is well-recognized. See *Carter-Wallace, Inc. v. Gardner*, 416 F.2d 1086, 1093 (4th Cir. 1969), *cert. den.*, 398 U.S. 938 (1970).

[20]*Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 809 (1973).

[21]*Cf. Nader v. F.C.C.*, 520 F.2d 182, 193 (D.C. Cir. 1975).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN F. DONELAN
FREDERIC L. WOOD
914 Washington Building
Washington, DC 20005

Attorneys for Respondent

Donelan, Cleary, Wood & Maser
914 Washington Building
Washington, DC 20005

Of Counsel

October 12, 1977